

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:MCT:WAS:RCH:TL-N-5599-00  
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date:

to: Chief, Appeals Division, Virginia-West Virginia District  
Attn: Appeals Officer David Nelms

from: LMSB Associate Area Counsel-Washington, D.C.  
Richmond, VA POD

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subject: [REDACTED] Assessment Period of Limitations

DISCLOSURE STATEMENT

This document contains taxpayer information subject to I.R.C. § 6103. It also contains confidential information subject to the attorney-client and deliberative process privileges, as it was prepared in anticipation of litigation. Therefore, this document shall not be disclosed to anyone other than Internal Revenue Service employees assigned to work on the particular case or subject matter addressed. Specifically, this document shall not be disclosed or circulated beyond such office personnel having the requisite "need to know." Under no circumstances shall this document be disclosed to taxpayers or their representatives.

ISSUE AND CONCLUSION

Issue: Whether the period of limitations for assessment has expired for the taxpayer's foreign sales corporation (FSC) subsidiary for the taxable period ending [REDACTED].

Conclusion: The period of limitations for assessment does not expire until [REDACTED], due to a 25 percent omission from gross income under I.R.C. § 6501(e).

FACTS

The Appeals Office currently has the case of [REDACTED] and its consolidated subsidiaries (the taxpayer), as well as [REDACTED] (the [REDACTED]). In the course of reviewing the case, the Appeals Officer discovered that an agreed upon increase in tax for the [REDACTED]'s taxable period ending [REDACTED] (the [REDACTED] year) had not been assessed. As the assessment period for the [REDACTED]'s return for that year would

ordinarily expire on [REDACTED], you have asked our opinion as to whether the period of limitations on assessment has expired.

The [REDACTED] filed a timely foreign sales corporation return (Form 1120-FSC) for the [REDACTED] taxable year. On [REDACTED] it filed an amended Form 1120-FSC for that period, reflecting an additional tax due of \$[REDACTED]. The taxpayer, [REDACTED], also filed an amended Form 1120 return at the same time and for the same period. The taxpayer requested an additional refund of \$[REDACTED]. Both returns reflected an adjustment the taxpayer had made which increased its sales commissions paid to the [REDACTED]. That adjustment increased the [REDACTED]'s gross income and provided the taxpayer with a corresponding deduction. On Schedule B of its original Form 1120-FSC, the [REDACTED] reported gross income of \$[REDACTED]. Schedule B of the amended return reported gross income of \$[REDACTED]. According to the revenue agent's report in this case, the adjusted gross increase to commissions was \$[REDACTED]. The taxpayer's return preparer, [REDACTED], sent a cover letter with the two returns, requesting that the two amounts be offset. Specifically, the cover letter states:

the amended returns are being submitted for the purpose of administrative convenience. [REDACTED] requests that you place a hold on the "[REDACTED] Balance Due" account pending the allowance of the related refund claim, to be applied first to the amount owing on the [REDACTED], and the remainder refunded.

The Service examined both amended returns and determined that the proper increase in income tax for the [REDACTED] was \$[REDACTED] rather than \$[REDACTED]. The [REDACTED] agreed to this deficiency in tax in a Form 870 executed by the [REDACTED] on [REDACTED]. The Form 870 referenced the related amended return filed by the taxpayer. An International Examiner had examined the [REDACTED] amended return and concluded, with the concurrence of her manager, that the offset requested in the cover letter by [REDACTED] had served to suspend the period of limitations on assessment. Accordingly, no assessment was made.

#### DISCUSSION

The ordinary period for assessment in the case of a timely filed tax return is three years from the due date of that return. I.R.C. § 6501(a). You informed us that the last day to assess based upon the [REDACTED]'s original return for the year at issue was [REDACTED]. Thus, absent some special rule, the period of limitations has expired with respect to the Form 1120-[REDACTED] filed for the taxable year ending [REDACTED]. The [REDACTED] did file

an amended return within sixty days of [REDACTED], that showed an additional amount of tax owed, but that only provided the Service with an additional 60 days to make an assessment. I.R.C. § 6503(c)(7).

We considered other possibilities as well for extending or suspending the statute. The reason advanced by the International examiner, the offset between the taxpayer and the [REDACTED], unfortunately has no basis under the Code. The taxpayer and the [REDACTED] are separate entities that filed separate returns. Under different circumstances, the Service might have a chance, although a small one, of arguing that the [REDACTED] was equitably estopped from asserting that the period of limitations for assessment had expired. However, the cover letter by [REDACTED] made no reference to the act of assessment, it merely asked that a hold be put on the account of the [REDACTED]. We also considered the mitigation provisions contained in I.R.C. §§ 1311 through 1314. The mitigation provisions were enacted to prevent a windfall arising from the inconsistent treatment of an item in different taxable periods. Mitigation covers specific situations and does not provide broad equitable relief. Bolten v. Commissioner, 95 T.C. 397, 402-03 (1990). The mitigation provisions clearly do not apply in this case. For one thing, there is no "circumstance of adjustment" as required in section 1312.

The Service, however, can utilize I.R.C. § 6501(e)(1), which prescribes a six year period of limitations for assessments where the taxpayer has omitted from gross income an amount in excess of 25 percent of the gross income stated on its return. A corporation's gross income is its gross receipts, not net gain. Connolly v. Commissioner, T.C. Memo. 1982-644. A foreign sales corporation reports its gross receipts on line 6 of Schedule B, "foreign trading gross receipts." On its original return, the [REDACTED] reported \$[REDACTED] on that line. On its amended return, the [REDACTED] reported that amount as [REDACTED]. The additional income agreed to by both parties amounted to \$[REDACTED]. This amount is in excess of 25 percent of the gross income amounts reported on both the original and amended returns. An additional complication is that the [REDACTED] reported the amount at issue (actually a greater amount) on its amended return. The taxpayer can avoid the six year period of limitations by disclosing the omitted gross income on its return or a statement attached to the return. I.R.C. § 6501(e)(1)(A)(ii). However, disclosure on an amended return does not prevent the application of the six year assessment period. Houston v. Commissioner, 38 T.C. 486 (1962). Thus, the six year assessment period prescribed in section 6501(e)(1) is applicable in this case and the assessment period does not expire until [REDACTED].

In conclusion, the assessment period with respect to the [REDACTED]'s taxable year ending [REDACTED], has not yet expired due to the special period of limitations rule contained in section 6501(e)(1). We recommend that you return the case to the exam group to make the assessment before the expiration of the assessment period on [REDACTED]. We are returning with this advisory opinion the portion of the administrative file that you gave us. If you have any questions, please call me at 771-8146.

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Associate Area Counsel

By: \_\_\_\_\_  
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Attachments: as stated.